SUPREME COURT, U.S.
FILED
JUN 21 1995
OFFICE OF THE CLERK

No. 94-1843

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Edgerton Sand & Gravel, Inc.,
Petitioner,

v.

General Casualty Company of Wisconsin
and Aetna Casualty and Surety Company,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Charles V. Sweeney
Of Counsel
N315 Charley Bluff Rd.
Milton, WI 53563
(608) 868-2710

Attorneys for Petitioner Edgerton Sand & Gravel, Inc.

David B. Goodwin
Counsel of Record
Joshua Koltun
Of Counsel
Heller, Ehrman, White & McAuliffe
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
INTRODUCTION AND SUMMARY OF ARGUMENT		1
ARGUMENT		2
I.	THIS COURT HAS JURISDICTION TO GRANT THIS PETITION	2
II.	THIS PETITION PRESENTS A DUE PROCESS QUESTION	5
III.	THIS PETITION PRESENTS A WAIVER OF DUE PROCESS QUESTION	8
CONCLUSION		10

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 5, 8

Brookhart v. Janis,
384 U.S. 1 (1966) 5

Fox Film Corp. v. Muller,
296 U.S. 207 (1935) 3

Hartford Fire Ins. Co. v. California,
509 U.S. ___ (1993) 6

Hill v. California,
401 U.S. 797 (1971) 2

Illinois v. Gates,
462 U.S. 213 (1983) 2, 9

Lynch v. New York,
293 U.S. 52 (1934) 2, 3

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 4, 7, 8

No. 94-1843

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Edgerton Sand & Gravel, Inc.,
Petitioner,

v.

General Casualty Company of Wisconsin
and Aetna Casualty and Surety Company,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Edgerton Sand & Gravel, Inc. submits the following reply to the brief in opposition filed by Respondents General Casualty Company of Wisconsin and Aetna Casualty & Surety Company (collectively, "Respondents").

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue that this Court lacks jurisdiction to grant the Petition for Writ of Certiorari because the Supreme Court of Wisconsin based its decision solely on state law. Respondents are mistaken. Petitioner preserved its right to raise the federal questions set forth in the Petition by asserting them below. That the Supreme Court of Wisconsin chose not to consider the federal questions in its decision does not deprive this Court of jurisdiction to address those federal questions. Moreover, the state rules enunciated in the decision below -- that recusal is not necessary when a judge has a substantial financial interest in an amicus curiae, and that a judge need not make a full disclosure of the basis for recusal when asking a party to waive its recusal rights -- fail to constitute an adequate and independent state ground that precludes Supreme Court review, since Due Process requires recusal under those circumstances.

In addition, Respondents assert that St. Paul Companies did not have an interest in the decision below -- an assertion that is contradicted by St. Paul's representation to the Supreme Court of Wisconsin that it was "vitally interested" in the outcome of this case. Also, Respondents argue that Wisconsin Supreme Court Justice Geske did not have a substantial financial interest in the St. Paul

Companies. But this argument finds no support in the record or in the decision below, and is belied by the fact that Justice Geske recused herself whenever St. Paul appeared as a party before the Supreme Court of Wisconsin.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT THIS PETITION

Respondents contend that the failure of the Supreme Court of Wisconsin to address Petitioner's Due Process arguments in the opinion below deprives this Court of jurisdiction to decide the Due Process question on a writ of certiorari. That contention is incorrect.

A federal question is preserved for Supreme Court review if the question has *either* been raised *or* been squarely considered and resolved in the state court. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983); *see also Hill v. California*, 401 U.S. 797, 805 (1971) (what must be preserved is the state court's *opportunity* to review the constitutionality of the state's actions). Here, Petitioner presented the Due Process question below. Edgerton Br. 12-13. Thus, Petitioner preserved the question for Supreme Court review.

Lynch v. New York, 293 U.S. 52 (1934), cited by Respondents (Opp. at 8), is not to the contrary. That case held that "if it does not appear [from the record] upon which of two grounds [-- federal and state law --] the judgment [below] was based, *and* the [state law] ground is sufficient

in itself to sustain it, this Court will not take jurisdiction." *Id.* at 54 (emphasis added).

Respondents ignore the critical distinction between cases in which the lower court's disposition of the state law question rendered the federal question moot, and cases in which the disposition of the state law question did not resolve the federal question. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935), cited by Respondents (Opp. at 9-10), is an example of the former. In that case, the plaintiff had sued on a contract. The defendant had defended on the grounds that the contract was invalid on state law grounds, and on the ground that the contract was invalid under the Sherman Act.[1] The court below determined that the contract was invalid on state law grounds. Thus, there was no need to reach the federal question. Had this Court taken jurisdiction on the federal issue in *Fox Film*, the opinion rendered would have been purely advisory.

In contrast to *Lynch* and *Fox Film*, the decision below is not supported by an adequate and independent state ground. In the proceeding below, Petitioner argued that a justice has an obligation to recuse himself or herself if the justice has a substantial interest in an amicus curiae. Edgerton Br. 12-14. The Supreme Court of Wisconsin concluded that Wisconsin's recusal statute did not require

---

[1] Specifically, the *state* law question in *Fox Film* was whether a portion of the contract that was *concededly invalid* under the Sherman Act was severable under state law from the rest of the contract. *Id.*

recusal if a justice has an interest in an amicus curiae (App. 109) -- even where, as here, the amicus curiae represented that it was "vitally interested" in the outcome of the case. The court held further that a justice is not required to make a full disclosure of the basis for a recusal request when the justice asks a party in a case before that court to waive recusal rights. App. 109-10.

The federal recusal cases upon which Respondents rely (Opp. at 11) do not support Respondent's contention that the Wisconsin recusal statute is an independent and adequate state ground for denying Petitioner's motion to recuse. In those cases, the courts *determined*, albeit sometimes with little discussion, that the requirements of a state recusal statute were greater than the requirements of Due Process, and thus *determined* that Due Process had not been violated. Those cases are far from holding that the Due Process issue was moot; on the contrary, they reached the Due Process question and concluded that Due Process was satisfied.

Respondent's argument begins from the *premise* that the Wisconsin recusal statute, as interpreted below, is more restrictive than the requirements of Due Process. Whether that premise is correct is precisely the issue that Petitioner has asked this Court to decide. It is of course true, as Respondent states, that the Wisconsin Supreme Court has the final say as to whether Justice Geske's failure to recuse herself violated Wisconsin law. Opp. at 12. By the same token, however, *this* Court determines independently whether such refusal violated petitioner's Due Process rights. *See, e.g., Ward v. Village of Monroeville*, 409 U.S. 57, 59

(1972) (reversing the determination of the Supreme Court of Ohio that a mayor/judge's impartiality was not diminished by his interest, as overseer of the village finances, in a $100 fine); *Brookhart v. Janis*, 384 U.S. 1, 4 n.4 (1966) ("When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record."). Thus, merely because Justice Geske's conduct passes muster under the Wisconsin recusal statute does not determine whether the Due Process Clause requires recusal.

II. THIS PETITION PRESENTS A DUE PROCESS QUESTION

Respondents assert next that the initial issue presented in this Petition -- whether Due Process requires recusal of a state supreme court justice who has a substantial interest in an *amicus curiae* that is vitally interested in the outcome of a case before the state supreme court -- in fact is a non-issue. Respondents suggest that this Court's precedent requires recusal of a judge in any situation "'which would offer a possible temptation to the average judge to . . . lead him not to hold the balance nice, clear and true,'" Opp. 14, quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986), including cases in which an *amicus curiae* is the entity that offers the temptation to the judge to abandon that balance.

Petitioner agrees -- indeed, that is the basis for its Petition for Writ of Certiorari. But the Supreme Court of Wisconsin disagrees. It held that a state supreme court justice has no recusal obligation unless the justice has a

substantial financial interest in a party. App. 109. An interest in an *amicus curiae*, that court stated, is not enough. *Id.* As is discussed more fully in the Petition, this Court should grant the Writ of Certiorari to decide whether the Supreme Court of Wisconsin's view is right.

Respondents assert further that St. Paul was not an *amicus curiae* in the Wisconsin Supreme Court proceeding. Opp. 14-15. That is incorrect. The *amicus* brief that the Insurance Environmental Litigation Associate filed states expressly that it was filed "on behalf of . . . St. Paul . . . ." ILEA Mtn. 2 n.2.

In addition, Respondents contend that St. Paul did not have the requisite interest in the outcome of the proceeding below. But St. Paul's own words contradict this contention. St. Paul told the Supreme Court of Wisconsin that it had a "substantial, independent interest[] in the questions presented" and was "vitally interested" in the proceeding below. *Id.* at 3-4.[2]

---

[2] In support of their argument, Respondents point to various statistics concerning the premiums that St. Paul received in the 1990s for the coverage that it currently writes in Wisconsin. Opp. 16-17. But St. Paul's interest in the interpretation of liability insurance policy provisions relating to insurance coverage for environmental cleanup costs does not depend on its current coverage, since virtually every insurance policy written since 1985 has an absolute exclusion for pollution claims. *See generally Hartford Fire Ins. Co. v. California*, 509 U.S. ___ (1993). Rather, what matters are

Respondents also suggest that Justice Geske did not have a substantial interest in St. Paul. But Respondents ignore that Justice Geske recused herself in the two cases before the Wisconsin Supreme Court in which St. Paul was a party. *See* Petition at 14. Respondents likewise ignore Justice Geske's holdings in the St. Paul Savings Plan (which include St. Paul stock),[3] Justice Geske's interest in the St. Paul retirement plan,[4] and the employment by St. Paul of Justice's Geske's husband, attorney Michael Hogan. This financial and personal stake is amply sufficient to support a Due Process claim. *See, e.g., Ward, supra*, 409 U.S. at 60-61 (even though the mayor/judge did not directly share in

---

the claims that St. Paul might be required to pay pursuant to the insurance that it wrote prior to 1985, when it provided pollution coverage. As to that issue, the Petition notes (at 15 & n.9) that St. Paul faces a substantial number of claims for insurance coverage for environmental cleanup costs, in Wisconsin and elsewhere.

[3] Respondents state that there is no evidence that Justice Geske held St. Paul stock. Opp. 15-16. As the opinion below reflects, however, that is incorrect. Justice Geske's financial disclosure statement, which is written in her own hand, states that her holdings consist, *inter alia*, of "St. Paul stocks and mutual funds." App. 109; Edgerton Br., Addendum B.

[4] That businesses commonly offer retirement plans, Opp. 15 & n.11, is beside the point. The St. Paul retirement plan benefits Justice Geske, who cast the deciding vote in a case in which St. Paul was "vitally interested."

petitioners' $100 fine, Due Process was violated because the fine went into the village coffers and the mayor/judge oversaw village finances).

Finally, Respondents argue that Due Process does not mandate recusal of a judge unless the judge actually receives a financial or personal benefit from the decision that the judge makes. Opp. 16-17. Here, Respondents point to the absence of evidence that Justice Geske's husband and St. Paul actually benefited from the decision below. *Id.* Respondents misstate the standard. Recusal is required when a judge faces a "'possible temptation'" to decide in favor of one of the parties, *Lavoie*, 475 U.S. at 822, not when the judge, or the entity in which the judge is interested, actually benefits from the decision. *See, e.g., Ward, supra*, 409 U.S. at 60-61.

III. THIS PETITION PRESENTS A WAIVER OF DUE PROCESS QUESTION

Respondents contend that Petitioner cannot present the question of waiver to this Court, because it never raised below the argument that no "voluntary, knowing, and intelligent" waiver had taken place. Respondents are mistaken. Petitioner asserted below that it was entitled to challenge Justice Geske's participation in the case and noted that Justice Geske did not make full disclosure to them. Edgerton Br. 9-11, 13-14. That Petitioner did not specifically use the words "voluntary, knowing and intelligent" in connection in its pleadings below is beside the point. It is sufficient that Petitioner contended that its Due Process rights were violated by Justice Geske's failure to

recuse herself without full disclosure. *Illinois v. Gates, supra,* 462 U.S. at 219-20 (parties before Supreme Court are not confined here to the same arguments which were advanced in the courts below upon a federal question).

Respondents also complain that Petitioner delayed in seeking recusal of Justice Geske. But Justice Geske's interest in the outcome of this appeal was not brought to Petitioner's attention until after the Supreme Court of Wisconsin issued its decision on the merits and a motion for reconsideration of that decision was pending. Petition at 7 n.3. Thus, this was not a case in which a party, knowing of grounds for recusal, delayed seeking such recusal in order to "sample the temper of the court." *See* Opp. at 20. That Petitioner waited slightly longer until after the denial of the motion for reconsideration before asking Justice Geske to recuse herself not only was prudent, but was a way of conserving judicial resources. In any event, the Supreme Court of Wisconsin held that it could reach the merits of the recusal motion notwithstanding the delay. *See* Petition at 9-10 & n.5.

Finally, Respondents assert that once Justice Geske disclosed that her husband was an employee of St. Paul, Petitioner had a duty to investigate to determine the extent of her interest in St. Paul. But that is the very issue that the Petition raises -- whether a justice seeking a waiver of a recusal obligation must make a full disclosure of the basis for recusal, so that the waiver is "voluntary, knowing and intelligent," or whether a partial disclosure will suffice. As is discussed in the Petition (at 17-20), prior decisions of this

Court strongly suggest that the former standard applies, but this Court has not yet squarely addressed the issue.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Charles V. Sweeney
Of Counsel
N315 Charley Bluff Road
Milton, WI 53563
(608) 868-2710

David B. Goodwin
Counsel of Record
Joshua Koltun
Heller, Ehrman, White & McAuliffe
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Attorneys for Petitioner
Edgerton Sand & Gravel, Inc.